United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1269

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1269

UNITED STATES OF AMERICA,
Appellee,

—v.—

HERBERT SPERLING,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Herbert Sperling appeals from an order and judgment resentencing him to a term of thirty years imprisonment and the imposition of a $50,000 fine, entered by the Honorable Milton Pollack, United States District Judge, for the Southern District of New York, on May 17, 1976 pursuant to the directions of this Court in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

Superseding Indictment 73 Cr. 441, filed May 11, 1973, charged Sperling and seventeen others in twelve counts with various violations of the federal narcotics laws. Count One charged Sperling and his co-defendants with conspiracy to violate the federal narcotics laws from January 1, 1971 up to and including the date of

filing the indictment in violation of Title 21, United States Code, Section 846. Count Two charged Sperling with organizing and supervising a continuing criminal narcotics enterprise, in violation of Title 21, United Code, Section 848. Counts Eight, Nine and Ten charged Sperling and others with the substantive offenses of distributing and possessing with intent to distribute one kilogram of cocaine in July 1971, two kilograms of heroin in November 1971 and one kilogram of cocaine in December 1971, respectively.

Trial commenced on June 18, 1973 before Judge Pollack and a jury. On July 12, 1973 the jury returned a verdict of guilty with respect to Sperling and ten other defendants on all counts in which they were named.

On September 12, 1973, Judge Pollack sentenced Sperling to life imprisonment and a $100,000 fine on Count Two; to concurrent terms of 30 years imprisonment to be followed by six years special parole on each of Counts One, Eight, Nine and Ten; and to a total of $200,000 in fines on these four substantive counts.

On October 10, 1974, this Court affirmed Sperling's convictions on Counts One and Two and reversed and remanded for a new trial on the three substantive counts (Counts Eight, Nine and Ten). *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). At that time this Court directed, in view of its reversal of three of the substantive counts, that the district court reconsider its sentence of Sperling on Count One. The mandate issued on January 30, 1975.

The Supreme Court denied Sperling's petition for a writ of certiorari on March 3, 1975. An order of *nolle prosequi* dismissing Counts Eight, Nine and Ten of Indictment 73 Cr. 441 as to Sperling was filed in the district court on May 16, 1975.

By notice of motion dated July 3, 1975 Sperling moved before Judge Pollack to vacate the order of *nolle prosequi* or, alternatively, to have the order amended so as to dismiss Counts Eight, Nine and Ten with prejudice. Judge Pollack denied Sperling's motion by order filed July 24, 1975. Sperling's appeal from that order was dismissed by the Second Circuit on January 26, 1976.

On May 17, 1976, after hearing argument by Sperling, *pro se*, Judge Pollack, on reconsideration, adhered to his original sentence that Sperling be imprisoned for 30 years and fined $50,000 on Count One, to run concurrently with the life sentence and $100,000 fine previously imposed on Count Two.

Sperling is presently serving his sentence.

For a full statement of the facts underlying the conviction, reference is made to this Court's opinion reported at 506 F.2d 1323.

ARGUMENT

POINT I

Sperling Is Foreclosed From Raising Issues Which Were Not Authorized By This Court's Mandate In Remanding For Resentencing, And, In Any Event, The Doctrine of Concurrent Sentences Precludes Review.

Sperling attempted to utilize the resentencing proceeding before the district court as a vehicle for a collateral attack upon his conviction on Count One. Thus, at that time, Sperling argued to the district court

that his conviction under 21 U.S.C. § 848 (continuing criminal enterprise, Count Two) barred his conviction under 21 U.S.C. § 846 (narcotics conspiracy, Count One) on grounds of Double Jeopardy. Sperling also argued that his sentence under Count One must be limited by the terms of 18 U.S.C. § 371 rather than 21 U.S.C. § 846, the statute on which he was charged in the indictment. The district court rejected these arguments and proceeded to resentence Sperling, as required by this Court. (506 F.2d at 1343). This appeal attempts to raise the issues which Sperling presented upon resentencing.

However, these issues are not related in any way to the reason expressed by this Court in its remand for resentencing. In its decision on the direct appeal, this Court wrote:

> "In view of the concurrent sentences on the conspiracy count (Count One) imposed on [Sperling] whose convictions on the substantive counts we reverse while sustaining [Sperling's] conviction on the conspiracy count we remand the cas[e] of [Sperling] for reconsideration of sentencing on the conspiracy count . . . ." (506 F.2d at 1335 n.14)

It was made apparent in this Court's opinion that the remand was for the singular purpose of allowing the district court to consider whether the convictions on the substantive counts might have affected the sentence imposed on the conspiracy count. 506 F.2d at 1343. The order of remand clearly did not contemplate that Sperling would be permitted to advance any of the attacks he now makes on the legality of the sentence under Count One. Since the purpose of the mandate was explicitly limited for reconsideration of the length of sentence on Count One, the district court lacked jurisdiction to hear the arguments raised by Sperling at the time of his resentencing.

United States v. *Kane*, 450 F.2d 77, 83 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); *United States* v. *Hoffa*, 436 F.2d 1243, 1248 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

Apart from the lack of jurisdiction in the district court to review the issues presented herein, a review of Sperling's appeal should be declined under the doctrine of concurrent sentences. Sperling's attack on his thirty year sentence under Count One in no way encroaches on the validity of the current life sentence under Count Two. Under the concurrent sentence doctrine, this Court should refuse to pass on Sperling's claims. *United States* v. *Gaines*, 460 F.2d 176, 178-80 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Febre*, 425 F.2d 107, 113 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970); *United States* v. *Orza*, 320 F.2d 524 (2d Cir. 1963). This doctrine is fully applicable where, as here, there is no reason why it should not be applied. *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied sub nom., Ciuzio* v. *United States*, 416 U.S. 985 (1974); *United States* v. *Febre*, *supra* at 113; cf. *Benton* v. *Maryland*, 395 U.S. 784, 789-92 (1969).

Moreover, all of the arguments now advanced by Sperling were available to him on the direct appeal but were not presented at that time. *United States* v. *West*, 494 F.2d 1314, 1315 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974). The frivolity of Sperling's claims impels the conclusion that these objections were deliberately bypassed by Sperling's experienced counsel on the direct appeal. (*Id.* at 1315). Indeed, in pre-trial motions Sperling's counsel had raised the claim that Section 846, (narcotics conspiracy), was a lesser included offense of Section 848, (continuing criminal enterprise). Judge Pollack had rejected the argument and Sperling's counsel did not bother raising the point upon direct appeal. (Appellant's Appen-

dix at 115) *See also Kaufman* v. *United States*, 394 U.S. 217 (1969); *United States* v. *Williams*, 463 F.2d 1183, 1184 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *United States* v. *Gordon*, 433 F.2d 313, 314 (2d Cir. 1970); *Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967).* Had these issues been deliberately bypassed on direct appeal and then raised in a petition pursuant to 28 U.S.C. § 2255, the review would be denied. The happenstance of the remand for resentencing should not permit Sperling to evade this rule of law and to obtain, in essence, a second direct appeal.

POINT II

Sperling's Conviction For Engaging In A Continuing Criminal Enterprise Does Not Bar The District Court From Imposing Sentence Upon His Conviction For Conspiracy.

Assuming *arguendo* that the issues raised by Sperling may be reached on their merits, they should each be rejected as frivolous. Sperling's initial claim is that the district court could not impose sentence on Count One, charging a narcotics conspiracy in violation of 21 U.S.C. § 846, because that was a lesser included offense of 21 U.S.C. § 848, the continuing criminal enterprise, for which he was charged and sentenced upon Count Two. As previously noted this argument was made by Sperling's coun-

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* Sperling's suggestion that counsel did not consult him is hardly plausible. In any event, Sperling himself could have intervened on his own behalf at the time of the direct appeal to raise this issue on his own. See *Kaufman* v. *United States*, *supra*, 394 U.S. at 220 n.3, *United States* v. *Reyes-Pulson*, Dkt. No. 75-1427, slip op. 4757, 4759 (2d Cir., July 2, 1976).

sel in pre-trial motions at which time Judge Pollack rejected the claim and the point was not raised on the direct appeal.

When Sperling raised the same argument at his resentencing, the district court in its memorandum opinion of May 17, 1976 again rejected it, noting that: "[A] conspiracy is entirely independent of a related substantive offense which itself charges concerted action so long as the conspiracy charged involves a larger number of participants than the substantive offense requires. *See, e.g., United States* v. *Bommarito*, 524 F.2d 140, 144 (2d Cir. 1975); *United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972); *vacated on other grounds*, 417 U.S. 903 (1974)." (Memorandum Opinion at 4). That holding should be affirmed under this Court's recent ruling in *United States* v. *Papa*, 533 F.2d 815, 833 (2d Cir. 1976). There, Judge Hays wrote:

> "prosecution under Section 848 is distinct and separate from prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on a continuing criminal enterprise."

This language made explicit the rule in this Circuit which previously was implicit by virtue of repeated affirmances of convictions under both Sections 848 and 846. *E.g. United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). At least two other circuits agree that convictions for both conspiracy and 21 U.S.C. § 848 may be sustained. *United States* v. *Jeffers*, 532 F.2d 1101 (7th Cir. 1976); *United States* v. *Collier*, 493 F.2d 327 (6th Cir. 1974), *cert. denied*, 419 U.S. 851 (1975).

Sperling's tedious analysis of various considerations, including the indictment, evidence, the charge to the

jury, congressional intent and recitation of cases construing 18 U.S.C. § 2113(a)(d) is to no avail. It is clear that in enacting Section 848 Congress intended to create an offense separate and distinct from that of Section 846. As expressed in its legislative history, Section 848 is "to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those guilty out of circulation" and constitutes "a *new and distinct offense* with all its elements triable in Court." 1970 U.S. Code Cong. and Admin. News 4576, 4651. (Emphasis added). "If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter." *Gore* v. *United States*, 357 U.S. 386, 390 (1958).

The statutory language itself confirms that the two statutes proscribe distinct and discrete conduct. Section 846 proscribes the *agreement* to distribute narcotics. *Ianelli* v. *United States*, 420 U.S. 770, 777 n.10, 785 (1975). Section 848 is directed at the kingpin who as organizer *"acts in concert"* with at least five others. *United States* v. *Sperling*, *supra*, 506 F.2d at 1344.

Just as the purposes and elements of each statute is distinct, so too, the evidence required to sustain a conviction as to each statute is distinct. Here, the indictment tracked the statutory language of Section 846 in Count One and of Section 848 in Count Two. The trial judge properly charged the jury as to the elements which must be found for Sperling to be convicted on each count. (Count One: Tr. 4121-23; Count Two: Tr. 4139-40). As this Court found on the direct appeal, there was sufficient evidence to sustain the convictions on Counts One and Two. Given the discrete offenses involved and the need for different evidence (in addition

to overlapping evidence) for conviction on Counts One and Two, the prohibitions of the Double Jeopardy clause have not been violated by imposing concurrent sentences. See *United States* v. *Bommarito*, 524 F.2d 140 (2d Cir. 1975).

POINT III

The 30-Year Sentence On Count One Was Proper Since Sperling Was Charged With and Convicted Of Violating 21 U.S.C. §846 And Not 18 U.S.C. §371.

Sperling argues that his sentence on Count One must be limited to the five year maximum sentence prescribed by 18 U.S.C. § 371. Sperling reasons that the provisions of Section 371 apply because: (a) if Section 846 were to apply the indictment would be duplicitous by charging as objects of the conspiracy both the "old" and the "new" law, (b) the trial court unconstitutionally amended the indictment by withdrawing from the jury the object to violate the "old law" and (c) the trial court charged the jury that the elements of Section 371 must be found in order to convict Sperling on Count One.

(a) The Indictment Was Not Duplicitous.

The indictment charged a single agreement to violate the narcotics statutes from January 1, 1971 up to the date of the filing of the indictment. Thus, the indictment properly charged a single conspiracy to violate, first, 26 U.S.C. § 7237(b), the narcotics laws in effect from January 1, 1971 to May 1, 1971 (the "old law") and, second, 21 U.S.C. § 841 the narcotics laws in effect after May 1, 1971 (the "new law"). Count One, charging Sperling with a conspiracy to violate both the old

and new laws, is not duplicitous. *See United States* v. *Quicksey*, 525 F.2d 337, 340 (4th Cir. 1975); *United States* v. *Amato*, 367 F. Supp. 547 (S.D.N.Y., 1973).

(b) The Withdrawal of the "Old Law" Portion of Count One Was Not an Impermissible Amendment of the Indictment.

The trial court expressly charged that the jury should consider May 1, 1971 as the earliest day that the conspiracy is alleged. (Tr. 4123).* Removal from the jury's deliberations the conspiracy's object to violate the "old law" did not violate Sperling's Fifth Amendment right to be tried on an indictment voted by the grand jury. *United States* v. *Colasurdo*, 453 F.2d 585, 590 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972). The trial court's action falls precisely within the rule that an indictment may be modified to narrow but not to enlarge the crime on which a defendant is tried. This Court has approved the deletion of surplusage as in a recent case where it was said that "the court in no way supplemented the indictment handed up by the grand jury or modified it so as to charge appellant with a new and different crime. Rather, the court merely ordered that a separate part of the indictment be deleted." *United States* v. *Sir Kue Chin*, 534 F.2d 1032, 1036 (2d Cir. 1976). *Accord United States* v. *Cirami*,

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* The indictment alleged a narcotics conspiracy from January 1, 1971 and charged among its objects an agreement to violate 26 U.S.C. §7237(b), the narcotics statute which was in effect until May 1, 1971. Upon finding no evidence that the conspiracy existed prior to May 1, 1971, the Court limited the case by charging the jury that the conspiracy could not be found to exist prior to that date and accordingly removed as an object of the conspiracy the violation of the "old" narcotics law, 26 U.S.C. § 7237(b).

520 F.2d 69, 73 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975).

(c) The Trial Judge's Charge on Count One Did Not Cause Sperling to be Convicted of Violating 18 U.S.C. §371 Rather than 21 U.S.C. §846.

Sperling argues that he must be sentenced under 18 U.S.C. § 371 because Judge Pollack cited Section 371 and referred to the elements of Section 371 in his charge to the jury. However, this Court has upheld the sentence of a defendant under the narcotics conspiracy statute notwithstanding defendant's contention that both the judge's charge to the jury and the indictment cited the general conspiracy law, 18 U.S.C. § 371. *United States* v. *McKenney*, 181 F. Supp. 143 (S.D.N.Y., 1959) (Weinfeld, *J.*), *aff'd sub nom.*, *United States* v. *Galgano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied sub nom. Carminati* v. *United States*, 366 U.S. 960 (1961). Here, Sperling was adequately apprised of the nature of the charge in the indictment. In fact, the indictment itself accurately cited Section 846. Moreover, as noted in the Judge Pollack's decision below, reference to Section 371 and recitation of its elements in the charge to the jury merely increased the Government's burden of proof by requiring proof of an overt act, an element not required by Section 846. (Memorandum Opinion at 9). *United States* v. *Bermudez*, 526 F.2d 89 (2d Cir. 1975). Here, therefore, there is no question that the jury convicted the defendant of conspiracy to violate the narcotics laws. *United States* v. *Galgano*, *supra*. Under these circumstances, even if the jury had been charged under Section 371 rather than 846, absent objection by trial counsel, the conviction under

Section 846 should be upheld. *United States* v. *Baratta*, 397 F.2d 215 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *United States* v. *Bates*, 424 F.2d 557, 559 (9th Cir.), *cert. denied*, 400 U.S. 831 (1970). See *United States* v. *Reyes-Padron*, Dkt. No. 75-1427, slip op. 4757, 4761 (2d Cir. July 2, 1976); *United States* v. *Papa*, *supra*, 533 F.2d at 825; *United States* v. *Bentvena*, 319 F.2d 916, 938 (2d Cir. 1963). Accordingly, Sperling's conviction and sentence under Section 846 is not subject to attack on this ground.

CONCLUSION

The order and judgment upon resentence should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—350—702

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JOHN S. SIFFERT being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13th day of September, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

HERBERT SPERLING
Box PMB 78271
United States Penitentiary
Atlanta Georgia 30315

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

John S. Siffert

Sworn to before me this

13th day of September, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977